

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1988

United States of America,

Appellee,

v.

Mario Flamenco,

Appellant.

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Appeal from the United States
District Court for the
Western District of Arkansas.

[UNPUBLISHED]

Submitted: January 27, 2004

Filed: February 5, 2004

Before MELLOY, HANSEN, and COLLOTON, Circuit Judges.

PER CURIAM.

A jury found Mario Flamenco guilty of one count of conspiring to distribute methamphetamine and one count of aiding and abetting the possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B)(viii), and 846, and 18 U.S.C. § 2. The district court¹ sentenced him to concurrent prison terms of 121 months followed by concurrent supervised release terms of 3 and 4 years. On appeal, counsel has moved to withdraw and has filed a

¹The Honorable Jimm Larry Hendren, Chief Judge, United States District Court for the Western District of Arkansas.

brief under Anders v. California, 386 U.S. 738 (1967), raising as issues whether the district court erred in sentencing Flamenco when it denied a downward departure and refused to find him eligible for a drug-treatment program, and erred at trial when it made adverse evidentiary rulings and refused to give certain jury instructions.

The district court stated that it would not exercise its discretion to grant a downward departure based on Flamenco's deportable-alien status; that decision is unreviewable, see United States v. Lim, 235 F.3d 382, 385 (8th Cir. 2000). A careful review of the trial transcript shows that the district court's conclusion that Flamenco's offense was a serious drug trafficking offense precluding a departure for aberrant behavior under U.S.S.G. § 5K2.20 is correct. Flamenco cannot meet the requirement of U.S.S.G. § 5C1.2(a)(5). We conclude the district court did not err in leaving the drug-treatment determination to the Bureau of Prisons, see 18 U.S.C. § 3621(b); did not abuse its discretion in any of its evidentiary rulings, see United States v. Claxton, 276 F.3d 420, 422 (8th Cir. 2002) (standard of review); and did not err in denying Flamenco's requests for jury instructions, see United States v. Lalley, 257 F.3d 751, 755 (8th Cir. 2001) (instructions as a whole must fairly and adequately submit issues to jury; court will reverse only if error affected defendant's substantial rights).

Following our independent review, see Penson v. Ohio, 488 U.S. 75 (1988), we find no nonfrivolous issues. Accordingly, we affirm the judgment of the district court, and we grant counsel's motion to withdraw.
